Heng Long Motor Trading Co v Osman bin Abdullah

HIGH COURT (KUCHING) — CIVIL APPEAL NO KG16 OF 1993/I
CHONG SIEW FAI J
16 APRIL 1994

Contract *— Sale of goods — Hire purchase — Whether agreement was a contract for sale of goods or hire-purchase agreement — Whether contract was between seller and buyer or seller and hire-purchase company — Whether seller liable to buyer or hire-purchase company for breach of condition*

Contract *— Sale of goods — Conditions and warranties — Implied warranty of quiet possession — Goods seized by Customs Department as material evidence in customs case — Whether seller had breached implied warranty — Sale of Goods Act 1979 (UK) s 12(2)(b)*

Civil Law Act *— English law — Applicability of English law in Sarawak in 1983 — Sale of goods — Whether Sale of Goods Act 1957 (West Malaysia) applicable or Sale of Goods Act 1893 or 1979 (UK) applicable — Civil Law Act 1956 s 5(2) — Sale of Goods Act 1957 (West Malaysia) — Sale of Goods Act 1893 and 1979 (UK)*

The respondent ('the customer'), bought a van from the appellant ('the dealer') for RM13,500 in 1983. The customer paid a deposit of RM5,500 and the balance of RM8,000 was financed by Affin Credit (M) Sdn Bhd ('the finance company'), which was the second plaintiff at first instance. The customer entered into a hire-purchase agreement with the finance company and, upon full settlement of the rent and term charges thereunder, the registration card of the van was returned to the customer.

However, on 13 May 1985, the van was seized by the Royal Customs and Excise Department, Kuching on the ground that it was material evidence in a customs case under investigation regarding its import. The customer and finance company then brought an action against the dealer for alleged breach of the implied condition of the dealer's right to sell and to give possession and sole and exclusive use and benefit of the van.

The trial magistrate dismissed the claim of the finance company on the ground that the latter, having been paid by the customer, had suffered no loss or damage. As for the customer, she held that: (i) there was a sale and purchase agreement, though not in writing, between the customer and the dealer, which had not been cancelled out by the hire-purchase agreement; and (ii) there had been, on the part of the dealer, a breach of the implied warranty of quiet possession of the goods by reason of the seizure of the van as well as a breach of the implied warranty of freedom from any charge or encumbrance in favour of any third party by reason of the customer having to pay to

A the Customs and Excise Department a sum of RM500 to buy back the van under s 115(1)(b) of the Customs Act 1967. The magistrate awarded RM10,811.10 to the customer against the dealer with costs. The dealer appealed.

The main question before the court was whether the magistrate B was justified in holding that there had been a sale of the van by the dealer to the customer prior to the entry of the hire-purchase agreement between the customer and the finance company.

Held, dismissing the appeal:

C (1) From the evidence, this was not a case where the finance company bought the van by paying the dealer the purchase price in full and then let it on hire-purchase to the customer but rather a case where the customer having paid the deposit, was unable to settle the balance on his own and had to seek a loan from the finance company for the purchase. Therefore, there was ample justification D for the magistrate to conclude that there had been a sale of the van by the dealer to the customer prior to the hire-purchase arrangement with the finance company.

(2) Based on the finding that there had been a sale of the van by the dealer to the customer, it was obvious that there had been a E breach of the implied warranty of quiet possession of the van under s 12(2)(b) of the UK Sale of Goods Act 1979 due to the lawful seizure of the van by the Customs And Excise Department. The implied warranty of quiet enjoyment protects the buyer not only against all acts of the seller but also the lawful acts of third F persons. If a buyer's full possession of goods is disturbed by a third party acting within his or its rights, the buyer is entitled to hold the seller liable and to be indemnified by the seller. The passage of time after the purchase, in itself, is no bar to the buyer's right of protection since time does not begin to run till the buyer's possession is disturbed.

G (3) The damages of RM10,811.10 awarded by the magistrate was confirmed, as the amounts of RM500 for repuchasing the van and RM4,311.10 to repair the van were not challenged by the dealer; and the award of RM6,000 for loss of use of the van was unquestionably modest, just and reasonable, considering that the H customer was deprived of the use of the van for five years.

Per curiam:

Since the transaction took place in 1983, by virtue of s 5(2) of the Civil Law Act 1956, the law applicable in Sarawak for the purpose of I this case was the UK Sale of Goods Act 1979 and not s 12 of the UK Sale of Goods Act 1893 or s 14 of the Sale of Goods Act 1957 (West Malaysia).

[Bahasa Malaysia summary

Responden ('pelanggan itu'), telah membeli sebuah van daripada perayu ('peniaga itu') untuk RM13,500 pada tahun 1983. Pelanggan itu telah membayar deposit sebanyak RM5,500 dan baki sebanyak RM8,000 telah dibiayai oleh Affin Credit (M) Sdn Bhd ('syarikat kewangan itu'), yang merupakan plaintif kedua di perbicaraan pertama. Pelanggan itu telah mengikat suatu perjanjian sewa-beli dengan syarikat kewangan itu dan, apabila sewa dan bayaran tempoh di bawah perjanjian sewa-beli itu telah dibayar dengan penuh, kad pendaftaran van itu telah dikembalikan kepada pelanggan itu.

Bagaimanapun, pada 13 Mei 1985, van itu telah dirampas oleh Jabatan Kastam dan Eksais Diraja, Kuching atas alasan bahawa ianya merupakan keterangan material di dalam suatu kes kastam mengenai pengimportannya yang sedang disiasat. Pelanggan dan syarikat kewangan itu kemudiannya telah membawa suatu tindakan terhadap peniaga itu kerana memungkiri syarat tersirat mengenai hak peniaga itu untuk menjual dan memberi milikan dan kegunaan serta manfaat tunggal dan eksklusif kepada van itu.

Majistret perbicaraan telah menolak tuntutan syarikat kewangan itu atas alasan bahawa ianya tidak mengalami apa-apa kerugian kerana ia telahpun dibayar oleh pelanggan itu. Berkenaan dengan pelanggan itu pula, beliau memutuskan bahawa: (i) terdapat suatu perjanjian jualbeli, walaupun ianya tidak bertulis, di antara pelanggan dan peniaga itu, yang tidak dibatalkan oleh perjanjian sewa-beli itu; dan (ii) pada pihak peniaga itu, terdapat suatu kemungkiran waranti tersirat mengenai milikan aman barangan itu kerana penyitaan van itu dan juga suatu kemungkiran waranti tersirat kebebasan barangan itu daripada sebarang gadaian atau bebanan yang memihak kepada sebarang pihak ketiga kerana pelanggan itu terpaksa membayar Jabatan Kastam dan Eksais jumlah sebanyak RM500 untuk membeli semula van itu di bawah s 115(1)(b) Akta Kastam 1967. Majistret itu telah mengaward jumlah RM10,811.10 kepada pelanggan itu terhadap peniaga itu dengan kos. Peniaga itu telah membuat rayuan.

Soalan utama di hadapan mahkamah adalah sama ada majistret itu berjustifikasi apabila membuat keputusan bahawa terdapat suatu jualan van itu oleh peniaga itu kepada pelanggan itu sebelum perjanjian sewa-beli itu diikat di antara pelanggan dan syarikat kewangan itu.

Diputuskan, menolak rayuan itu:

(1) Daripada keterangan yang ada, ini tidak merupakan suatu kes di mana syarikat kewangan itu telah membeli van itu dengan membayar harga penuh kepada peniaga itu dan menyewanya secara sewa-beli kepada pelanggan itu tetapi ianya merupakan suatu kes di mana pelanggan itu, selepas membayar deposit, tidak mampu membayar baki harga van itu dengan sendirinya dan

terpaksa mendapatkan suatu pinjaman daripada syarikat kewangan itu untuk belian tersebut. Oleh itu, terdapat justifikasi yang lebih daripada mencukupi untuk membolehkan majistret itu memutuskan bahawa terdapat suatu jualan van itu oleh peniaga itu kepada pelanggan itu sebelum perjanjian sewa-beli itu diikat dengan syarikat kewangan itu.

(2) Berdasarkan keputusan bahawa terdapat suatu jualan van itu oleh peniaga itu kepada pelanggan itu, adalah jelas bahawa terdapat suatu kemungkiran waranti tersirat mengenai milikan aman van itu di bawah s 12(2)(b) UK Sale of Goods Act 1979 akibat daripada penyitaan sah van itu oleh Jabatan Kastam dan Eksais. Waranti tersirat milikan aman melindungi seseorang pembeli bukan sahaja daripada semua tindakan penjual tetapi juga daripada tindakan sah pihak ketiga. Jika milikan barangan yang sempurna oleh seseorang pembeli itu diganggu oleh seorang pihak ketiga yang bertindak mengikut haknya, pembeli itu berhak menjadikan penjual itu bertanggungan dan mendapatkan tanggung rugi daripada penjual itu. Laluan masa selepas belian itu, dengan sendirinya, tidak merupakan suatu halangan kepada hak pembeli untuk mendapatkan perlindungan kerana masa tidak mula berlalu sehingga milikan pembeli diganggu.

(3) Ganti rugi sebanyak RM10,811.10 yang telah diawardkan oleh majistret itu disahkan, kerana jumlah sebanyak RM500 untuk membeli semula van itu dan jumlah sebanyak RM4,311.10 untuk membaiki van itu tidak dicabar oleh peniaga itu; dan award sebanyak RM6,000 untuk kehilangan kegunaan van itu begitu rendah sehingga ianya tidak dapat dipersoalkan dan adalah adil dan munasabah, memandangkan bahawa pelanggan itu telah kehilangan kegunaan van itu selama lima tahun.

Per curiam:

Oleh kerana transaksi itu telah dijalankan pada tahun 1983, mengikut s 5(2) Akta Undang-Undang Sivil 1956, undang-undang yang terpakai di Sarawak bagi tujuan kes ini adalah Sale of Goods Act 1979 (UK) dan bukannya s 12 Sale of Goods Act 1893 (UK) atau s 14 Akta Jualan Barangan 1957 (Malaysia Barat).]

Notes

For cases on the sale of goods, see 3 *Mallal's Digest* (4th Ed) paras 1498–1499.

Cases referred to

1 *Ahmad Ismail v Malaya Motor Co & Anor* [1973] 2 MLJ 66 (distd)
2 *Niblett v Confectioners' Materials Co Ltd* [1921] 3 KB 387 (folld)
3 *Mason v Burningham* [1949] 2 KB 545; [1949] 2 All ER 134 (refd)

Legislation referred to
Sale of Goods Act 1979 s 12(2) [UK]

John Shek (John Shek & Co) for the appellant.
Peter Mijim (Battenberg & Talma) for the respondent.

Cur Adv Vult

Chong Siew Fai J: This is an appeal by the defendant against the decision of the learned magistrate giving judgment against the defendant for the first plaintiff in the sum RM10,811 with interest at 8%pa from the date of the judgment and costs.

The case is on a sale and purchase cum a hire-purchase arrangement of a motor vehicle, ie a van bearing registration no KJ 8275, involving, as is often than not, financing by a finance company.

The action was brought by the first plaintiff and the second plaintiff against the defendant for RM15,100 and/or damages resulting in an alleged breach of the implied condition of the defendant's right to sell and to give possession and sole and exclusive use and benefit of the van in that on or about 13 May 1985 the van was seized by the Royal Customs and Excise Department, Kuching on the ground that 'it is a material evidence to a customs case under investigation regarding its import'. There was also a claim for interest and costs.

For the purpose of this appeal, it is convenient to refer to the first plaintiff as 'the customer', the second plaintiff as 'the finance company', and the defendant as 'the dealer'.

The following facts are not in dispute:

(1) In the purchase of the van at RM13,500, the customer negotiated and paid the dealer a deposit RM5,500 (which, however, was disputed by the dealer whose sales credit manager, DW2, said the customer paid only RM5,200). The payment of RM5,200 was supported by two receipts of the dealer dated 12 January 1983 and 20 January 1983 (exhs P3 and P2), respectively.
(2) The balance of the price of the van, RM8,000, was financed by the finance company with whom the customer entered into a hire-purchase agreement dated 24 January 1983 (exh P1) under which the customer agreed to pay the rent, RM8,000, plus term charges, RM1,600, by 24 rent instalments of RM400 each.
(3) The rent and term charges of RM9,600 were fully settled by the customer to the finance company on 25 January 1985 and the registration card of the van was returned to the customer upon the settlement.
(4) On 13 May 1985, the van together with the registration card was seized by the Customs and Excise Department, Kuching.
(5) Immediately after the van was seized, the customer informed the dealer about the seizure and was told by DW1 that they (the dealer) had bought the vehicle from an importer.

(6) On or about 7 May 1990, the Customs and Excise Department sold back the van to the customer for RM500 (exh P6).

In her judgment, the learned trial magistrate dismissed the claim of the finance company on the ground that the latter having been paid by the customer all the amount under the hire-purchase agreement, had, on evidence, suffered no loss or damage. As for the customer, she held that in relation to the van there was a sale and purchase agreement, though not in writing, between the customer and the dealer. This is what she said:

> (1) I do believe that there is this sale agreement entered into between the first plaintiff and the defendant when the defendant agreed to sell the said van to the first plaintiff by arranging a finance for the first plaintiff with the second plaintiff under hire-purchase agreement. The peculiarity of this arrangment of hire-purchase is that the second plaintiff immediately became the owner of the said van until payment [was] fully settled by the first plaintiff. Then again it does not actually wipe out the sale agreement that took place between the first plaintiff and defendant. (At p 35 of the appeal record.)
>
> (2) Now, in holding that there is this sale of goods agreement between the two parties, ... It is obvious that there was no written agreement ... (at p 36 of the appeal record.)

The learned trial magistrate then went on to hold that there had been, on the part of the dealer, a breach of the implied warranty of having and enjoying quiet possession of the goods by reason of the seizure of the van by the Customs and Excise Department as well as a breach of the implied warranty of freedom from any charge or encumbrance in favour of any third party by reason of the customer having to pay to the Customs and Excise Department a sum of RM500 to buy back the van from the Customs and Excise Department under s 115(1)(b) of the Customs Act 1967. (At p 38 of the appeal record.)

After dealing with the issue of damages, she awarded the total sum of RM10,811.10 to the customer against the dealer with costs.

The first question to consider is: Was the learned trial magistrate justified in holding that there had been a sale of the van by the dealer to the customer prior to the entry of the hire-purchase agreement (exh P1) between the customer and the finance company? This may be considered from three aspects:

(a) the pleadings;
(b) the witnesses' evidence; and
(c) the documentary evidence.

A *The pleadings*

On the pleadings, this has been put in issue. (See para 1 of the amended statement of claim and para 1 of the amended defence on pp 57 and 59 of the appeal record, respectively.)

B *The witnesses' evidence*

As regards the evidence:

(1) PW1, the credit officer of the finance company said:

(i) 'This is the amount that the dealer is selling the vehicle to the hirer' (at p 14 of the appeal record);

though under cross-examination, he said:

(ii) 'I agreed that pursuant to P1, our company has bought over the vehicle from the dealer and hired it out to Encik Osman bin Abdullah. Therefore P1 was signed between our company and Encik Osman.

Based on P1, I agreed that Encik Osman bought the vehicle from our company.' (At p 15 of the appeal record.)

Pausing here, it may be noted that the above evidence of PW1 under cross-examination is based on exh P1, ie the hire-purchase agreement between the finance company and the customer.

(2) PW2, the customer said:

'In January 1983, I had a dealing with one Heng Long Motor Trading Co whereby I bought a Toyota Town Ace van bearing registration no KJ 8275 from them with a cash deposit of RM5,500 paid.' (At p 16 of the appeal record.)

This point was not specifically cross-examined upon.

(3) DW1, Goh Swee Heng, the proprietor of the dealer said:

(i) 'My company did sell a car to him.' (At p 24 of the appeal record);
(ii) 'The vehicle was sold to Osman under my company's name' (at p 25 of the appeal record);

however, under cross-examination, DW1 had also said:

(iii) 'I also told him (meaning the customer) to see Affin Credit (M) Sdn Bhd. I told him so because we have sold the car to Affin Credit (M) Sdn Bhd.' (At p 24 of the appeal record.)

It may be noted that according to DW1 himself, this remark of his was made to the customer when the latter told him about the seizure of the van by the Customs.

(4) DW2, Goh Mui Cheng @ Goh Swee Cheng, the then sales manager of the dealer, said:

(i) 'Sometime in January 1983, one Osman bin Abdullah did come to see me to purchase a vehicle from me. He did purchase a Toyota Town Ace Van (Petrol) at RM13,500. He did not pay in full. He paid a down payment of RM5,200' (at p 26 of the appeal record);

(ii) 'The vehicle was subsequently registered under Osman bin Abdullah's name. The registration number is KJ 8275' (at p 27 of the appeal record);
(iii) 'After the sale of the van to him, he did not come back to see me' (at p 27 of the appeal record); and
(iv) Under cross-examination, DW2 said: 'After he had paid RM5,200, we released the vehicle to him' (at p 28 of the appeal record.)

C *The documentary evidence*

As regards the documentary evidence, the two receipts of the dealer exhs P2 and P3 clearly indicate that a total sum of RM5,200 was paid by the customer and one Mdm Ting Hung Ing to the dealer on 20 January 1983 (RM4,200) and on 12 January 1983 (RM1,000) respectively. The two receipts expressly stated the payments as 'down payment' or 'deposit' for van. Furthermore, in the hire-purchase agreement exh P1, the deposit of RM5,500 was excluded from the amount stipulated to be paid in the 24 instalments to the finance company. More significantly, there is no evidence whatever that this deposit of RM5,500 was paid by the customer to the finance company. The oral evidence establishes without doubt the sum of either RM5,500 or RM5,200 was paid by the customer to the dealer vide receipts exhs P2 and P3. Indeed, in face of the record, learned counsel for the dealer had but to concede that there was evidence of sale of the van to the customer.

From the oral and the documentary evidence referred to above, there is ample material justifying the learned trial magistrate to come to the conclusion that there existed the sale and purchase transaction of the van between the dealer and the customer, prior to the creation of the hire-purchase agreement (exh P1). From the evidence, this is *not* a case where the finance company bought the van by paying the dealer the purchase price in full and then let it on hire-purchase to the customer but rather a case where the customer having paid the deposit, was unable to settle the balance on his own and had to seek loan from the finance company for the purchase. That was how the hire-purchase agreement was created. In this connection, it is noted that when the customer went to see DW1 about the seizure by the Customs, DW1 had told him that they (dealer) had sold the vehicle to Affin Credit (M) Sdn Bhd (finance company) (see p 24 of the appeal record). However, this cannot be the position since there is evidence including that of DW1 himself, on which the learned trial magistrate concluded that there had been a sale of the vehicle by the dealer to the customer prior to the hire-purchase arrangement with the finance company. With that conclusion, I respectfully agree.

I am fully aware that in *Ahmad Ismail v Malaya Motor Co & Anor*,[1] the plaintiff/hirer, like the customer in our case, himself paid the initial part of the price by surrendering his own car and in cash, and had the balance raised by entering into a hire-purchase agreement with a finance company.

Unlike in our present case where the customer and the finance company jointly sued the dealer, in *Ahmad Ismail*'s case,[1] the plaintiff/hirer sued both the car dealer and the finance company. Another important feature in *Ahmad Ismail*'s case[1] is that the Federal Court did not hold that there was no sale between the car dealer and the plaintiff/hirer. It held that there was such a sale but that it was ultimately superseded by the hire-purchase agreement between the plaintiff/hirer and the finance company and accordingly ruled that the plaintiff's claim against the car dealer failed. (See p 67 col 1I.)

There is, in my view, good reason for the above decision because a perusal of the judgment will show that in that case the plaintiff sued both defendants for breach of contract and the alleged breach was that of a condition implied by s (1)(b) of the Hire-Purchase Act 1967. In other words, in *Ahmad Ismail*'s case,[1] the plaintiff founded its action upon the Hire-Purchase Act 1967 whereas in the instant case, the plaintiff relied on the Sale of Goods Act 1893 [UK] though the Act was not specifically pleaded as such. For the above reasons, I agree with the view of the learned trial magistrate that *Ahmad Ismail*'s case,[1] is not applicable to our present case.

Before going further, I would say a word about the references to the UK Sale of Goods Act 1893 by learned counsel for the customer and by the learned trial magistrate. In his submission in the lower court, counsel referred to s 12 of the UK Sale of Goods Act 1893 whereas the learned trial magistrate in her judgment relied on s 14 of the West Malaysian Sale of Goods Act 1957. Both sections are identical. In my view, since the transaction took place in 1983, by virtue of s 5(2) of the Civil Law Act 1956, the law applicable in Sarawak for the purpose of this case is the UK Sale of Goods Act 1979, more precisely, s 12(2)(b) thereof. However, despite the errors, the conclusion of the learned trial magistrate is not affected since, so far as relating to our instant case, the result on the issue would be the same by the application of s 12(2)(b) of the said 1979 Act.

Based on the finding, which is supported by evidence and with which I respectfully agree, that there had been a sale of the van by the dealer to the customer, it is obvious that there had been a breach of the implied warranty of quiet possession of the van under s 12(2)(b) of the UK Sale of Goods Act 1979. This is borne out by the undisputed evidence that the van was lawfully seized by the Customs And Excise Department on or about 13 May 1985 and was resold to the customer for RM500 on or about 7 May 1990 (ie nearly five years later).

Section 12(2) of the UK Sale of Goods Act 1979 provides:

> In a contract of sale, other than one to which Subsection (3) below applies, there is also an implied warranty that:
>
> ...
>
> (b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

A For the dealer, counsel argued that the learned trial magistrate was wrong to invoke the Sale of Goods Act 1957 since the customer had used the van for over two years without any interruption and that the seizure by the Customs And Excise Department was not caused by the dealer. With respect, I am unable to agree. The implied warranty of quiet enjoyment protects the buyer not only against all acts of the seller but also the *lawful* B acts of third persons. If a buyer's full possession of goods is disturbed by a third party acting within his or its rights, the buyer is entitled to hold the seller liable and to be indemnified by the seller. *Niblett v Confectioners' Materials Co Ltd.*[2] And, in *Mason v Burningham*[3] it was held that the warranty was wider and could be invoked by buyer where someone claiming C by title paramount, eg the true owner of the goods, disturbed his possession (at p 563). The passage of time after the purchase, in itself, is no bar to the buyer's right of protection since time does not begin to run till the buyer's possession is disturbed.

This disposes of grounds of appeal Nos 2, 3, 4 and 5.

D *Damages*

I now come to the question of damages. As a general principle, the measure for damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty (s 53(2) of the 1979 Act). This includes consequential damages. E Thus in *Mason v Burningham*[3] the plaintiff was awarded costs of overhauling the typewriter that was found to have been stolen.

It is clear from the judgment of the learned trial magistrate in our instant case that the award of RM10,811.10 was arrived at as follows:

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(1)	RM500	being the price for repurchasing the van from the Customs and Excise Department;
(2)	RM4,311.10	being costs of repair of the van; and
(3)	RM6,000	being loss of use.
	RM10,811	

G Although items (1) and (2), being special damages, were not specifically pleaded, the customer had been allowed to give evidence relating thereto without any objection from or on behalf of the dealer.

Ground 6 of the appeal reads:

> The learned magistrate erred in law and in fact in holding the opinion that exh P7A–E had not been challenged by the defendant and awarded the sum to H the first respondent.

In his submission counsel for the dealer submitted that the documents tendered for identification as 'ID7 (a–e)' were challenged and were never tendered as exhibits. He also submitted that the sum RM4,311.10 should not have been allowed in that authorship of the documents was not proved. I Putting at the lowest, I find the submission of counsel relating to the documents contrary to what was recorded to have taken place during the trial. A perusal of the notes of proceedings of the trial magistrates' court

clearly shows that although the documents were initially challenged, they were subsequently admitted in evidence and marked as exhs P7 (a–e) after counsel for the dealer indicated to the court that he would not object to the documents being marked as exhibits. Counsel also informed the trial court that he did not wish to cross-examine the customer respecting the exhibits (see pp 18 and 23 of the appeal record).

Before me, learned counsel for the dealer stated that he did not say in the lower court that he would not object to ID7 (a–e) being admitted in evidence and would not cross-examine PW2. I am not prepared to accept the statement. In his initial submission before me, learned counsel for the dealer said none of those things. He raised them only in his reply after the matters (ie admission of the documents as exhibits and his stand of declining to cross-examine) were pointed out by learned counsel for the customer. The notes of evidence cover only 15 pages of the appeal record; the exhibits were also specifically mentioned in the judgment of the learned trial magistrate. It is difficult to accept that the recorded remarks of counsel about not objecting to the documents being admitted in evidence and not cross-examining PW2 could have totally escaped the notice of any reasonably prudent and careful counsel especially when the admission of the documents in evidence was made a specific ground of appeal. If counsel were serious about the matters, steps should have been timely taken to have them investigated into and, if found justified, to have the relevant part expunged from the record. It would not be right to have the substance of the record altered by a mere statement from the Bar particularly when the statement does not find support from the opponent.

In his evidence, the customer testified that after recovering the van through repurchasing, the vehicle was not functioning at all and had to be repaired costing him RM4,311.60. The name of the workshop and its address were given. His evidence was not in any way challenged. The learned trial magistrate obviously accepted his evidence as the truth and awarded the sum RM4,311.10. On the evidence, I see no reason to disagree with the award.

This ground must fail.

Ground 8 of the appeal states:

> The learned magistrate failed to give consideration of the evidence of the whole case in arriving at the decision that the appellant shall pay the first respondent a nominal sum of RM6,000 as loss of use to the said van without giving any reason.

Loss of use may be claimed in the form of general damages. So claimed, it is usually a matter of assessment based on the evidence adduced. To some extent, the damage may have to be inferred or presumed. In our instant case, the customer has adduced evidence to prove that he had suffered loss by reason of the wrongful deprival of his use of the van and has attempted to quantify the loss he thereby suffered in the region of RM30,000. The learned trial magistrate, however, rejected the amount and considered a sum of RM6,000 reasonable. The complaint that the learned trial magistrate failed to give consideration to the evidence as a whole in arriving at the

decision has no merit. In my view, considering that the customer was deprived of the use of the vehicle for about five years, the award of RM6,000 is unquestionably modest, just and reasonable.

Ground 7 of the appeal reads:

> The learned magistrate erred in law and in fact in allowing a total sum of RM10,811.10 to the first respondent without considering and failed to appreciate the evidence of the whole case.

I have dealt with the awards on the costs of repair and the loss of use. There remains the sum of RM500 being the amount for the repurchasing of the van from the Customs and Excise Department. The customer gave evidence on the repurchase of the van at RM500 without any objection; and his evidence in this respect was not challenged.

For the dealer, learned counsel argued that exh P6, the receipt for the payment of RM500 was not proved in that the maker thereof was not called. According to the notes of proceedings, exh P6 was admitted in evidence 'with no objection from defendant's solicitor' (see p 18 of the appeal record). In any event, there is ample credible evidence from the customer justifying the award of the sum RM500. I see no reason for disagreeing with it.

For the reasons given, the appeal is dismissed with costs to be paid by the dealer (the appellant) to the customer (the respondent). In the absence an of agreement, such costs are to be taxed.

Appeal dismissed.

Reported by Anne Khoo